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Federal Permitting Improvement Steering Council Executive Director Final Determination of Covered Project Status

September 2, 2022

Case No. 2022-002

In re Atlantic Shores North

I. Summary

Atlantic Shores Offshore Wind, LLC (Project Sponsor) seeks “coverage” under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41), 42 U.S.C. §§ 4370m *et seq.*, for the Atlantic Shores North project (Project), a 1.5-Gigawatt commercial scale wind project proposed to be located offshore of the State of New Jersey on approximately 81,000 acres of lease No. OCS-A-0549 issued by the Department of the Interior’s (DOI) Bureau of Ocean Energy Management (BOEM). The Project Sponsor submitted a notice of the initiation of a proposed “covered project” (FAST-41 Initiation Notice, a.k.a., project “FIN”) on June 10, 2022.¹ In the 84 days since submitting the Project FIN, the Project Sponsor has been seeking from DOI a clear determination that the Project is a FAST-41 covered project. Now, the Project Sponsor requests a final and conclusive determination of FAST-41 coverage for the Project from the Federal Permitting Improvement Steering Council (Permitting Council) Executive Director. FAST-41 establishes a process for obtaining final and conclusive determinations about covered project status in half that time.

The Executive Director has reviewed the record and, for the following reasons, determines that the Project is a FAST-41 covered project, and no provision of law has been identified by the facilitating agency that precludes the application of FAST-41’s requirements to the Project. Accordingly, the Executive Director will create an entry for the Project on the Federal Permitting Dashboard, and DOI must establish a Coordinated Project Plan (CPP) and comprehensive permitting timetable for the Project no later than November 1, 2022.

II. Legal Background

A. FAST-41 “Covered Project”

Through requirements for the posting and management of a permitting timetable on the Federal Permitting Dashboard, FAST-41 provides procedural and transparency benefits to “covered projects.” FAST-41 defines a “covered project,” in relevant part, as follows:

¹ See Exhibit 1 (Initial Project FIN).

42 U.S.C. § 4370m(6) Covered project

(A) In general

The term “covered project” means any activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, carbon capture, or any other sector as determined by a majority vote of the Council that—

- (i) (I) is subject to NEPA [*i.e.*, the National Environmental Policy Act];
- (ii) (II) is likely to require a total investment of more than \$200,000,000; and
- (iii) (III) does not qualify for abbreviated authorization or environmental review processes under any applicable law;

* * *

With certain exemptions that are not relevant here, a proposed project that meets these criteria is a FAST-41 “covered project.”

B. FAST-41 Notice of the Initiation of a Proposed Covered Project (a.k.a., “FIN”) Requirements

Participation in the FAST-41 program is voluntary. To become a FAST-41 covered project, a Project Sponsor must submit a complete FIN to the Executive Director and the appropriate facilitating or lead agency.² Pursuant to 42 U.S.C. § 4370m-2(a)(1)(C), the FIN must contain the following information:

- (i) a statement of the purposes and objectives of the proposed project;
- (ii) a concise description, including the general location of the proposed project and a summary of geospatial information, if available, illustrating the project area and the locations, if any, of environmental, cultural, and historic resources;
- (iii) a statement regarding the technical and financial ability of the project sponsor to construct the proposed project;
- (iv) a statement of any Federal financing, environmental reviews, and authorizations anticipated to be required to complete the proposed project; and
- (v) an assessment that the proposed project meets the definition of a covered project under section 4370m of this title and a statement of reasons supporting the assessment.

² A “facilitating agency” is the agency responsible for reviewing a project FIN and carrying out the primary agency functions under FAST-41 until a lead agency is identified for the project pursuant to the National Environmental Policy Act (NEPA). See 42 U.S.C. §§ 4370m(13) (defining “facilitating agency”); 4370m(15) (defining “lead agency”); 4370m-1(c)(1)(B); and 4370m-2(a)(5).

C. Processing a FIN and Determining Project Coverage

The facilitating or lead agency first determines if the FIN is complete. If the FIN lacks sufficient or actionable information to determine that the above five criteria have been met, including that the project meets the FAST-41 covered project definition, then the following processes and their associated timetables do not apply.³

Within 14 days of receiving a complete FIN, the Permitting Council Executive Director must create an entry for the covered project on the Permitting Dashboard unless the Executive Director, or the facilitating or lead agency, determines that the project sponsor failed to demonstrate in the FIN that the project is a covered project.⁴ If the facilitating or lead agency determines that the project is not a covered project, the project sponsor has 14 days to submit to the Permitting Council Executive Director further information explaining why the project is a covered project (a.k.a., an “appeal” of an adverse project coverage determination).⁵ Within 14 days of receiving a project sponsor’s appeal, the Executive Director must make a “final and conclusive determination as to whether the project is a covered project” and, if it is a covered project, create an entry on the Permitting Dashboard for the project.⁶

D. The FAST-41 Savings Clause and Limitations Provision

Pursuant to the savings clause at 42 U.S.C. § 4370m-6(d)(1), nothing in FAST-41 “supersedes, amends, or modifies any Federal statute or affects the responsibility of any Federal officer to comply with or enforce any statute.” Relatedly, pursuant to the limitations provision at 42 U.S.C. § 4370m-6(e)(2), nothing in FAST-41 “preempts, limits, or interferes with . . . any power, jurisdiction, responsibility, or authority that a Federal, State, or local governmental agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to any project, plan, or program.” In light of these statutory provisions, the Permitting Council Executive Director is careful to administer FAST-41 in a way that avoids unreasonably interfering with or confounding an agency’s administration of any Federal regulatory or permitting program.⁷ Nonetheless, the bar for putting aside FAST-41’s statutorily prescribed procedures is high; agencies must comply with the procedural requirements of FAST-41 unless doing so would make it impossible to rationally

³ See, e.g., July 14, 2021, DOI Letter re: Twin Metals Minnesota Project FAST-41 Initiation Notice – Department of the Interior Recommendation (rejecting mining FIN because it failed to sufficiently articulate technical and financial ability of the project sponsor to execute the project per 42 U.S.C. § 4370m-2(a)(1)(C)(iii); see also Executive Director Memorandum re Executive Director Role and Responsibilities in Determining Whether a Project is a Covered Project Pursuant to Title 41 of the Fixing America’s Surface Transportation Act (FAST-41) (Jan. 2021) (ED Project Coverage Memorandum), at 2 (If a submitted project FIN lacks information sufficient to determine that project is a FAST-41 covered project [per 42 U.S.C. §§ 4370m-2(a)(i)(c)(v)], then the project is not a FAST-41 covered project and the Executive Director will not create an entry for the project on the Permitting Dashboard”).

⁴ 42 U.S.C. §§ 4370m-2(a)(1)(C)(v), 4370m-2(b)(2)(A)(ii).

⁵ *Id.* § 4370m-2(b)(2)(B).

⁶ *Id.* § 4370m-2(b)(2)(C); see generally, ED Project Coverage Memorandum.

⁷ See Federal Permitting Improvement Steering Council, Data Management Guide for FAST-41 Covered Projects on the Permitting Dashboard, at 36-37 (April 2022) (DMG) (where an existing agency requirement conflicts with a FAST-41 requirement, the FAST-41 requirement must move aside, and the existing agency requirement controls); In re Virgo Solar and Solar 373 Projects, Executive Director Determination of Covered Project Status (July 22, 2022).

administer an existing Federal program under Federal law.⁸

III. Procedural Background

On June 10, 2022, the Project Sponsor submitted a FIN to the Executive Director and DOI, the FAST-41 facilitating agency for offshore wind projects, seeking FAST-41 covered project status for the Project.⁹ Fourteen days after FIN submission, on June 24, 2022, DOI verbally informed the Permitting Council Office of the Executive Director (OED) that DOI had determined that the Project is not a FAST-41 covered project. Accordingly, pursuant to 42 U.S.C. § 4370m-2(b)(2)(A)(ii), the Executive Director did not create an entry for the Project on the Permitting Dashboard.¹⁰

Notwithstanding the verbal communication, neither the Executive Director nor the Project Sponsor received written confirmation from DOI that it had determined that the Project is not a covered project. As explained in the January 2021 Executive Director Memorandum re Executive Director Role and Responsibilities in Determining Whether a Project is a Covered Project Pursuant to Title 41 of the Fixing America's Surface Transportation Act (FAST-41) (ED Project Coverage Memorandum), the project sponsor's 14-day "appeal" period begins if, 14 days after submitting a FIN, the project sponsor receives no response from the government.¹¹ Accordingly, the Project Sponsor's appeal period pursuant to 42 U.S.C. § 4370m-2(b)(2)(B) began on June 25 and extended through July 8, 2022.

On July 7, 2022, one day before Project Sponsor's appeal period was set to expire, and 13 days after DOI informed OED that DOI had determined that the Project is not a covered project, DOI sent a letter to the Project Sponsor (July 7 DOI Letter) stating that the Project FIN submitted on June 10 "includes the information required to be submitted pursuant to 42 U.S.C. § 4370m-2(a)(1)(C) to be considered a "covered project" under FAST-41."¹² Despite this, the July 7 DOI Letter goes on to state that DOI "does not believe that the project is appropriate for inclusion on the FAST-41 Permitting Dashboard at this time" because: (i) the Project Sponsor did not identify a contractor for preparing the Environmental Impact Statement (EIS) for the project under NEPA; and (ii) the Project Sponsor did not submit certain surveys and associated analysis necessary for BOEM to issue a Notice of Intent to Prepare an EIS (NOI) for the Project and to fully form NEPA alternatives.¹³ The July 7 DOI Letter does not provide a connection or any explanation between these alleged deficiencies and FAST-41's procedural and permitting timetable requirements. Instead, the July 7 DOI letter concludes as follows:

⁸ See DMG at 36-37 (including examples); Virgo and Solar 363 ED Covered Project Determination ("covered" solar projects not added to the Permitting Dashboard because doing so would impermissibly frustrate DOI Bureau of Land Management's (BLM) ability to administer regulatory program for competitive issuance of exclusive rights to apply for BLM authorization).

⁹ Exhibit 1.

¹⁰ See 42 U.S.C. § 4370m-2(b)(2)(A)(ii) (Executive Director must add project to the Permitting Dashboard within 14 days of FIN receipt unless the Executive Director or the facilitating or lead agency determines that the project is not a covered project).

¹¹ See ED Project Coverage Memorandum, note 3 *supra*, at 2-3; see also In re Battle Born Solar Project, Executive Director Final Determination of Covered Project Status, No. 2020-001, at 3-4 (Oct. 8, 2020) (Battle Born ED Covered Project Determination).

¹² Exhibit 2.

¹³ *Id.*

BOEM will continue to review the COP [*i.e.*, offshore wind project Construction and Operations Plan] and supporting documents and coordinate with Atlantic Shores to resolve the above-identified deficiencies and/or identify an alternative approach that will allow BOEM to determine an NOI publication date with enough certainty to develop a Coordinated Project Plan and permitting timetable estimates. At that time, Atlantic Shores may re-submit a FIN to initiate the FAST-41 process.¹⁴

The Project Sponsor's appeal period expired the following day.

It appears that the Project Sponsor treated the July 7 DOI letter as a timely response to the Project FIN and believed that its appeal period began on the that date. Fourteen days later, on July 22, 2022, the Project Sponsor submitted a letter to DOI invoking the FAST-41 project coverage appeal provisions at 42 U.S.C. § 4370m-2(b)(2)(B) & (C) (July 25 Project Sponsor Response Letter).¹⁵ The July 25 Project Sponsor Response Letter responds to the factual assertions in the July 7 DOI Letter and provides additional information in support of FAST-41 coverage for the Project. The July 25 Project Sponsor Response Letter highlights that the July 7 DOI letter admits that the Project FIN meets applicable requirements, and that the Project is a FAST-41 covered project.¹⁶

The Project Sponsor also sent the July 25 Project Sponsor Response Letter to OED. When OED followed up with DOI, DOI indicated that BOEM and the Project Sponsor were working together to resolve the issues identified in the July 7 DOI Letter. Neither DOI, nor the Executive Director, responded in writing to the July 25 Project Sponsor Response Letter, and the Project still was not added to the Permitting Dashboard.

On August 19, 2022, the Project Sponsor again requested the government to post the Project to the Permitting Dashboard as a FAST-41 covered project. In its "Appeal of BOEM's default denial of Atlantic Shores North FAST-41 Initiation Notice (August 19 Project Sponsor Appeal Letter)," the Project Sponsor invokes 42 U.S.C. § 4370m-2(b)(2)(C) to seek from the Executive Director a "final and conclusive" determination that the Project is a FAST-41 covered project entitled to immediate posting on the Permitting Dashboard.¹⁷

Upon receiving the August 19 Project Sponsor Appeal Letter, OED consulted with BOEM to better understand BOEM's rationale and basis for declining to add the Project to the Permitting Dashboard. BOEM maintains that the Project Sponsor's COP submitted to BOEM for authorization of the Project is incomplete. Finding the COP incomplete, BOEM holds that it cannot begin the NEPA process for the Project. According to BOEM, the agency is unable to prepare an NOI or identify alternatives for consideration under NEPA until the Project Sponsor submits certain geotechnical survey data that currently is missing from the Project COP. As stated

¹⁴ *Id.* at 2.

¹⁵ Exhibit 3. Because the letter was received via email after 5pm ET on July 22, and July 22 was a Friday, the Permitting Council Executive Director is tracking the letter as submitted on Monday, July 25, 2022.

¹⁶ *Id.*

¹⁷ Exhibit 4.

in the July 7 DOI Letter, absent the missing survey information, BOEM believes that it lacks “enough certainty” to develop the CPP and permitting timetable required by FAST-41.¹⁸

IV. Discussion

The Executive Director did not add the Project to the Permitting Dashboard within 14 days of receiving the June 10 Project FIN in reliance on representations from DOI that it had determined that the Project is not a covered project.¹⁹ The first written documentation of DOI’s assessment of the Project came in the July 7 DOI Letter, which confirmed that the Project FIN met the applicable FAST-41 requirements and was, in fact, a covered project.

The July 7 DOI Letter intimates, but does not directly state or explain, that the survey information that is missing from the Project COP is material to BOEM’s ability to comply with the FAST-41 requirements to create a CPP and manage a FAST-41 permitting timetable. The July 7 DOI Letter tacitly invokes the FAST-41 savings clause and/or reservation provision at 42 U.S.C. §§ 4370m-6(d) and (e), respectively, to exclude the Project from FAST-41 coverage. After reviewing the record and subsequently discussing the June 10 FIN, July 7 DOI Letter, July 25 Project Sponsor Response Letter, and August 19 Project Sponsor Appeal Letter with BOEM, the Executive Director cannot discern any basis for invoking either the savings clause or limitations provision—or any other legal requirement—to prevent adding the Project to the Permitting Dashboard as required by law.

To be sure, extant surveys that may be necessary to prepare an NOI and formulate NEPA alternatives may present a challenge for BOEM’s development and management of a FAST-41 permitting timetable for the Project on the Dashboard. But the fact that establishing and managing a permitting timetable may be challenging does not obviate the agency’s legal obligation to do so.

All FAST-41 permitting timetables, including BOEM’s 11 active offshore wind project permitting timetables, include dependencies (i.e., Federal milestone completion dates that are dependent on state, local, project sponsor, or other Federal actions) like the one identified in the July 7 DOI Letter. Examples include: (i) Clean Water Act section 404 authorizations, which are dependent on the completion of state Clean Water Act section 401 certifications; (ii) resource agency consultations pursuant to the Endangered Species Act, which are dependent on the lead agency first submitting a Biological Assessment; and (3) OCS Clean Air Act permits, which are dependent on the Project Sponsor first submitting necessary data and analysis.²⁰ All these actions are routinely included in FAST-41 covered project permitting timetables, including the offshore

¹⁸ July 7 DOI Letter at 2. The Executive Director notes that BOEM has thus far has posted, and currently manages on the Permitting Dashboard, 11 FAST-41 permitting timetables for covered offshore wind projects, none of which have submitted to BOEM the survey information that the July 7 DOI Letter asserts is a necessary precondition to posting the Project on the Permitting Dashboard. The most recent of these projects, the Kitty Hawk South Offshore Wind Project, was added to the Permitting Dashboard in May 2022. <https://www.permits.performance.gov/permitting-project/kitty-hawk-south-offshore-wind-project>.

¹⁹ See 42 U.S.C. § 4370m-2(b)(2)(A)(ii) (Executive Director must add project to the Permitting Timetable *unless* the Executive Director or the facilitating or lead agency determines the project is not a covered project).

²⁰ All 11 offshore wind permitting timetables were posted and are currently managed without the benefit of the information BOEM asserts is now necessary for permitting timetable posting and management for the Project.

wind project permitting timetables that BOEM currently manages. The Project Sponsor dependency identified in the July 7 DOI letter is no different.

The fact that the project sponsor has yet to submit surveys BOEM deems essential to issue an NOI should not present a barrier to implementing FAST-41, unless the absence of that information would render the Project Sponsor's proposal projectless. The only written explanation provided by BOEM to the Project Sponsor, the July 7 DOI Letter, does not make that case. Moreover, despite the representations in the July 7 DOI Letter, nothing in FAST-41 requires or suggests that a particular degree of "certainty" is required to create or manage a FAST-41 permitting timetable. To the contrary, the FAST-41 statute expressly contemplates flexible permitting timetables that can be modified as needed to accommodate the realities of complex, multi-year permitting processes, as well as environmental reviews and authorization processes that include dependencies.²¹

Relatedly, the fact that the Project Sponsor has not yet submitted to BOEM the information BOEM considers necessary to prepare an NOI or formulate NEPA alternatives does not present a barrier to implementing FAST-41's requirements for posted covered projects.²² FAST-41 expressly requires the facilitating or lead agency to consult with the project sponsor before establishing or modifying a FAST-41 permitting timetable.²³ The Permitting Dashboard additionally allows agencies to establish and manage project sponsor "milestones" (such as the submission of survey data), that may be needed to facilitate subsequent agency action (such as the preparation of an NOI).²⁴ In the event that the project sponsor fails to timely deliver the required information, or the agency determines that the information is inadequate, the agency may re-establish the date by which the project sponsor must submit the information, and modify accordingly any dependent agency actions. The March 2022 Permitting Council Data Management Guide for FAST-41 Covered Projects on the Permitting Dashboard (a.k.a., DMG) additionally contemplates the possibility of "pausing" Federal actions on a FAST-41 permitting timetable if the agency is unable to reach the project sponsor or obtain from the project sponsor revised dates for submitting the necessary information.²⁵

In the past, the Executive Director has declined to post to the Permitting Dashboard other ostensibly "covered" projects. This has been for reasons grounded in the FAST-41 statute. For example, in July 2021, DOI declined to extend FAST-41 coverage to the Twin Metals mining project because the FIN did not sufficiently articulate the financial capability of the project sponsor to construct the project pursuant to 42 U.S.C. § 4370m-2(a)(1)(C).²⁶ Recently, the Executive Director affirmed DOI's decision to decline FAST-41 coverage to the Virgo and Solar 363 projects on the basis that posting the projects to the Permitting Dashboard would unreasonably and impermissibly interfere with the Bureau of Land Management's (BLM)

²¹ See, e.g., 42 U.S.C. § 4370m-2(c)(2)(D) (modification after approval).

²² For example, in August 2021, BLM created a FAST-41 covered project permitting timetable for the Bonanza Solar Project, which contemplates the issuance of an NOI over two and a half years later, in March 2024. See <https://www.permits.performance.gov/proj/bonanza-solar-project/environmental-impact-statement-eis>.

²³ 42 U.S.C. §§ 4370m-2(c)(2)(A) & (c)(2)(D)(i)(II).

²⁴ See also Permitting Council Data Management Guide for FAST-41 Covered Projects on the Permitting Dashboard, at 5, 33 (March 2022) at <https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-08/2022%20Data%20Management%20Guide.pdf>.

²⁵ *Id.* at 11-12, 13.

²⁶ See also 42 U.S.C. § 4370m-2(g) (technical and financial feasibility FIN requirement is substantive).

administration of its leasing regulations in contravention of the FAST-41 limitations provision at 42 U.S.C. § 4370m-6(e)(ii). The Executive Director has found no discernible similar justification based on the record presented for this Project.²⁷

In the 84 days since the Project Sponsor submitted the Project FIN, neither the Executive Director nor the facilitating agency has determined that the Project is *not* a covered project.²⁸ In fact, DOI has expressly acknowledged that the project *is* a covered project. DOI additionally agrees that the Project FIN meets FAST-41 requirements and has not identified any legal requirement that precludes extending FAST-41 benefits to the Project. The Executive Director's obligation to create an entry on the Permitting Dashboard for a covered project is not extinguished by the government's failure to take timely action on a project FIN.²⁹ Accordingly, the Executive Director must create an entry on the Permitting Dashboard for the Project.

V. Conclusion

The Project Sponsor has demonstrated that the Project is a covered project, as defined by FAST-41. The Executive Director agrees and, because no provision of law has been identified that would prevent posting the Project on the Permitting Dashboard, the Executive Director must add the Project to the Permitting Dashboard.

The CPP and permitting timetable for the Project are due on November 1, 2022.

In the future, the Executive Director will create an entry on the Permitting Dashboard for a project that the Executive Director believes to be a covered project within 14 days of FIN receipt unless the Executive Director receives from the facilitating or lead agency a written determination that the project is not a covered project, or a written determination that another provision of law prohibits or prevents the project from receiving FAST-41 coverage.

Dated: September 2, 2022



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Federal Permitting Improvement Steering Council

²⁷ For example, in the Virgo and Solar 373 ED Covered Project Determination, the Executive Director found that FAST-41 could not be applied to the projects because the project sponsor had not yet obtained the exclusive right to apply for a BLM right-of way, and therefore legally had no "project proposal." In contrast, the OCS lease obtained by the Project Sponsor in 2018 specifically grants the Project Sponsor the exclusive right to apply for project authorization from BOEM. *See Fisheries Survival Fund v. Jewell*, No. 16-cv-2409, 2018 WL 4705795, at *8, 9 (D.D.C. Sep. 30, 2018).

²⁸ *See* 42 U.S.C. § 4370m-2(b)(2)(A)(ii).

²⁹ *See* In re Battle Born Solar Project, Executive Director Final Determination of Covered Project Status, No. 2020-001 (Oct. 8, 2020).